

EXHIBIT A

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1 P R O C E E D I N G S

2 THE CLERK: In re: Pharmaceutical Industry Average
3 Wholesale Price Litigation, Civil Action No. 01-12257,
4 MDL 1456, will now be heard before this Court. Will counsel
5 please identify themselves for the record August 3, 2006.

6 MR. SOBOL: Good afternoon, your Honor. Tom Sobol
7 for the plaintiffs.

8 THE COURT: Good afternoon.

9 MR. SPECTER: Good afternoon. Shanin Specter,
10 plaintiffs.

11 MR. HAVILAND: Don Haviland, your Honor, for the
12 plaintiffs.

13 MR. BERMAN: Steve Berman, your Honor.

14 MR. EDWARDS: Steve Edwards, BMS.

15 MR. MONTGOMERY: John Montgomery, Schering-Plough
16 and Warrick.

17 MR. WISE: Scott Wise for AstraZeneca, your Honor.

18 MR. CAVANAUGH: Bill Cavanaugh, Johnson & Johnson.

19 MR. DeMARCO: Michael DeMarco, Aventis.

20 MR. MUEHLBERGER: Jim Muehlberger, Aventis.

21 MR. STEMPEL: Scott Stempel, Pfizer and Pharmacia.

22 MR. GOBENA: Your Honor, I would just like to let
23 you know the United States --

24 THE COURT: Has arrived. Actually, why don't you
25 come on up here.

1 MR. GOBENA: All right.

2 THE COURT: And I'm going to ask the USA something
3 ex parte for one second because there's something that was
4 just transferred up here, and I'm not sure --

5 MR. GOBENA: Your Honor, should we identify
6 ourselves for the record?

7 THE COURT: Yes, do that, because I didn't know
8 there were so many of you all.

9 MR. GOBENA: My name is Gejaa Goven. I'm with the
10 Justice Department.

11 MR. HENDERSON: George Henderson, Assistant U.S.
12 Attorney.

13 MR. BREEN: Jim Breen for the relator Ven-A-Care,
14 the 402s.

15 THE COURT: All right, then we know. All right, I
16 just didn't know if that's public.

17 MR. HENDERSON: It is as a matter of the caption of
18 the case.

19 THE COURT: All right, so why don't at least one of
20 you sit here. The case involving -- you've stepped in and
21 decided to intervene, is that it?

22 MR. GOBENA: That's correct, your Honor.

23 THE COURT: The government has? Are you all
24 familiar with what I'm talking about?

25 MR. MONTGOMERY: Yes, your Honor.

1 MR. CAVANAUGH: Yes.

2 THE COURT: All right, so you get a table to
3 yourself.

4 MR. DALY: Your Honor, just for the record, Jim
5 Daly. I'm here for Abbott Labs, the company that the
6 government intervened with respect to.

7 THE COURT: Okay, thank you very much. I wasn't
8 sure, because I just got notice of it through the MBD docket,
9 whether it was still sealed or not, and that was why I wanted
10 to make sure that I checked that out before I spilled it out
11 in front of this entire room. But it's now public. The
12 Department of Justice is here, right?

13 MR. GOBENA: That's correct, your Honor.

14 THE COURT: All right, so what is your position in
15 general in this case? I haven't had a chance to even go
16 through what the case is about from the Justice Department's
17 point of view.

18 MR. GOBENA: Sure, your Honor. As your Honor has
19 noted, we've intervened in a case that originated in the
20 Southern District of Florida against -- the defendants in the
21 case are Abbott Labs and Hospira as well --

22 THE COURT: And?

23 MR. GOBENA: Hospira, which was a spin-off of
24 Abbott Labs, and what was spun off was the division that
25 manufactured the drugs that were identified in our complaint.

1 THE COURT: Yes, but what's the case? Was it an
2 AWP case?

3 MR. GOBENA: It's a False Claims Act case alleging
4 AWP pricing fraud, so it's the same general subject matter as
5 these cases, but we're bringing it under the False Claims Act
6 as well as we have an unjust enrichment claim and a common
7 law fraud claim as well.

8 THE COURT: And just so I can get a lay of the
9 land -- you may not be prepared to answer this question -- is
10 this just going to be limited to these drugs involving
11 Abbott, or are you going to have a stake in the rest of this
12 litigation?

13 MR. GOBENA: We're really not prepared to answer
14 that question at this time, your Honor, but it's fair to say
15 that there may be additional defendants that enter into our
16 case.

17 THE COURT: All right, thank you. Right now, I
18 thought it would be worthwhile to ask the plaintiffs how much
19 they've accomplished in their notice, since that essentially
20 is the threshold to doing anything, what's been sent out,
21 what hasn't been -- oh, there you are.

22 MR. NOTARGIACOMO: Good afternoon, your Honor. Ed
23 Notargiacomo for the plaintiffs. We are on track with
24 everything your Honor has ordered us to do. On Friday
25 , July 28, we mailed all of the TPP notices.

1 THE COURT: Third-party payor, right.

2 MR. NOTARGIACOMO: Third-party payor notices. The
3 Web site for third-party payors, that version of the Web site
4 went live on Monday, so that as those third-party payors
5 receive the notices, additional information is available.
6 The same thing with the phone bank available to answer
7 third-party payor questions about it as they receive the
8 notices. We are on track with the consumer --

9 THE COURT: So just remind me. Is that just
10 Track 1 third-party payors, or is it Track 2 as well?

11 MR. NOTARGIACOMO: It is just Track 1 third-party
12 payors, your Honor.

13 THE COURT: And just in Massachusetts?

14 MR. NOTARGIACOMO: Well, the third-party payors
15 could be anywhere in the United States.

16 THE COURT: Right, but just with respect to the
17 Massachusetts 93A claim.

18 MR. NOTARGIACOMO: That's right.

19 THE COURT: Yes, I misspoke. All right, so that's
20 going forward just on people who have claims under the
21 Massachusetts statute with respect to third-party payors just
22 for Track 1?

23 MR. NOTARGIACOMO: Yes, your Honor. The notice
24 included notice to third-party payors who would be in Class 2
25 as well as Class 3.

1 THE COURT: All right, so for everyone. I don't
2 have to worry about them again.

3 MR. NOTARGIACOMO: That's correct.

4 THE COURT: What about, when's the opt-out date?
5 What did we end up with?

6 MR. NOTARGIACOMO: I believe October 1, 2006.

7 THE COURT: Now, as I understand it, and I don't
8 know if you all saw this, I got a report from the Department
9 of Health and Human Services yesterday through Mr. Henderson
10 which basically said that, much more polite language, but
11 basically no way are they going to let the notice go in the
12 Medicare bulletin, legalese for "over my dead body." So at
13 this point I think that that is a moot issue. It's too
14 expensive; they don't want it. It's not worth the holdup to
15 litigate the thing. Does anyone feel differently about
16 that?

17 Okay, so we're back with the individualized
18 notice. And, Mr. Henderson, are we on track for that? Have
19 you checked?

20 MR. HENDERSON: I haven't checked recently. I've
21 certainly let the agency know of your order, and I haven't
22 heard anything, anything suggesting that they can't meet it.
23 I can certainly follow up to make sure.

24 THE COURT: Okay, so what I want you to do is every
25 month check.

1 MR. HENDERSON: All right.

2 THE COURT: Because, as you can tell, I'm really
3 moving this at this point, and I'm counting on a Class 1
4 trial in March.

5 MR. HENDERSON: All right, I'll put that on my
6 calendar.

7 THE COURT: You know, just tickler it in every
8 month, write me a little status report just to make sure
9 we're on track because I've got this whole thing triggered to
10 a March date.

11 MR. NOTARGIACOMO: All right.

12 THE COURT: All right, that's great, with respect
13 to Class 1.

14 Now we're dealing with September and November, the
15 two time periods. I've had a chance to briefly read your
16 submissions because I didn't get them till late yesterday,
17 and I was on trial all day today and haven't had a chance to
18 return to them. So the gist of it is, as I understand it,
19 everyone agrees nothing will happen as far as the trial in
20 September. There's a disagreement about November, about
21 whether there should be any proceeding and what it should
22 look like. You want to do Daubert in September.

23 MR. MONTGOMERY: Correct, correct.

24 THE COURT: But I'm just talking about the trial, a
25 basic merits proceeding, which we are going to get to. I'm

1 going to do something in November. I've locked it up, I have
2 staffed up, and that's what we're going to do. So I reject
3 plaintiffs' request to move everything into March. I reject
4 defendants' request to just do knowledge. Knowledge is a
5 piece of it. The plaintiffs have ignored the fact that
6 knowledge is relevant because I have a statute of limitations
7 problem. I've got a discovery rule. At the very least, we
8 have to find out what they knew and when they knew it for
9 when the discovery rule tolled, although you might be quite
10 right that it isn't dispositive on a 93A claim.

11 In addition, knowledge is quite relevant to
12 reasonable reliance, especially in the world of Class 3. So
13 I will take whatever I learn in the trial in November, and I
14 will use it in dealing with the Class 3.

15 Class 2 is more of a statutory kind of claim,
16 although I still have the intent to deceive, and that
17 intent-to-deceive knowledge has some relevance as to whether
18 or not there was an intent to deceive. So knowledge is
19 relevant, but it's not dispositive.

20 MR. MONTGOMERY: Your Honor, we apologize that your
21 Honor did not receive our paper earlier. I think our concept
22 about how to proceed in November is to focus, in order to
23 avoid any overlap with Class 1, on the conduct of the TPPs
24 and the context in which they were operating during the class
25 period, for your Honor to take all of the evidence that the

1 parties would present with respect to that scope. And at
2 some point, of course, you're going to have to determine the
3 issues to which that evidence is relevant. We certainly have
4 a disagreement about the relevance of this evidence, but
5 certainly it is relevant to the statute of limitations issue,
6 and that's why we focused on statute of limitations.

7 THE COURT: Right.

8 MR. MONTGOMERY: But we think it's broader.

9 THE COURT: I think that I want to jump start this
10 for lots of reasons. One is, this litigation is too slow.
11 I'm starting myself to feel bogged under by it without an end
12 in sight. I think, to the extent that I hold a trial, I will
13 get a handle on the issues in a way that will make me a
14 better trial judge for the actual jury trial. Two, I think
15 it will facilitate people taking a good look at whether
16 settlement is in their best interests; and, three, I can sort
17 of figure out as I'm going some of the expert issues without
18 having to have a major new Daubert hearing. I was thinking
19 of possibly -- are you going to be calling your witness in
20 any event for that --

21 MR. BERMAN: Our expert witness?

22 THE COURT: Yes.

23 MR. BERMAN: Yes, we are, your Honor.

24 THE COURT: So one thought I have is, since you're
25 paying him by the day anyway, I'm sort of assuming, I would

1 see him some of the afternoons on the Track 3 expectation
2 kind of theory.

3 MR. BERMAN: Correct.

4 THE COURT: Does that make sense?

5 MR. BERMAN: We were going to suggest that you can
6 do any Daubert-ing while you're listening and they're
7 cross-examining at that hearing.

8 THE COURT: So I'm going to do Track 1, Class 2, in
9 November.

10 Now, I don't know what plaintiff is thinking about
11 when you're talking about -- what was it, 20 hours a side for
12 a 93A? That was what you were talking about?

13 MR. BERMAN: Well, what we think we need to do --

14 THE COURT: You think you're going to do a
15 two-month trial?

16 MR. BERMAN: No, we don't. We think we need
17 roughly five to seven days --

18 THE COURT: Three and a half hours a day.

19 MR. BERMAN: -- to get in everything we need to get
20 in on knowledge.

21 THE COURT: No, no, no, this is the whole -- catch
22 this -- the whole. It's not just knowledge. You're going to
23 prove your case, if you can.

24 MR. BERMAN: Correct.

25 THE COURT: So I don't know why it's just

1 knowledge. You think you can do seven trial days to try
2 your -- so we'll do -- we'll have a three-week trial.

3 MR. BERMAN: Correct. We can get our liability
4 case out in five to seven trial days.

5 THE COURT: But what about damages?

6 MR. BERMAN: And damages.

7 THE COURT: Okay, so seven trial days.

8 And what do you think you need?

9 MR. MONTGOMERY: Your Honor, if you're talking
10 about trying the entire case on Class 2 and Class 3 --

11 THE COURT: No, just Class 2.

12 MR. MONTGOMERY: Just Class 2, and then you're
13 talking about doing Daubert --

14 THE COURT: And there may be some overlap that I'll
15 just, you know, import into a Class 3. I'm assuming a fair
16 amount will --

17 MR. MONTGOMERY: Yes, but to just talk about
18 Class 2 and Class 3 together for a second, and just starting
19 with statute of limitations but extending to other issues,
20 we've got the same class representatives, the same kinds of
21 issues, the same conduct focusing on the TPP part of the
22 story. So it's the same for Class 2 and Class 3 until you
23 get to the edges. It's exactly the same.

24 THE COURT: Well, the edges, though, are the really
25 hard economic issues because one's a statutory claim and

1 one's sort of more of a, was there an unfair or deceptive
2 practice that somehow inflated the price in a way the TPPs
3 couldn't have known? So you may think it's identical or not.
4 I haven't thought it through --

5 MR. MONTGOMERY: We do, and I know we need to have
6 more discussion, and this is not the time to do it.

7 THE COURT: You need to have more discussion about
8 it, but, in any event, damages will vary dramatically.

9 MR. MONTGOMERY: Damages will vary.

10 THE COURT: Okay, so it's possible liability is the
11 same. I really haven't given it any thought, so. . . I'd be
12 willing to consider Track 2 and 3, but I want the whole
13 thing. I want people to really focus on this. How many
14 defendants are going to be in Track 1, four or five?

15 MR. BERMAN: Just four, your Honor.

16 MR. MONTGOMERY: No. In Track 1 there are three.
17 Oh, excuse me, Class 1 is three. Track 1 is four. Excuse
18 me.

19 MR. BERMAN: Four, and the fifth will -- we're
20 almost there. Next week.

21 THE COURT: The check's in the mail?

22 MR. SOBOL: Yes.

23 MR. BERMAN: Next week.

24 MR. SOBOL: The check's in the mail.

25 THE COURT: So that's where we'll go on it in

1 November. But let's assume for a minute you're right, that
2 it ends up being both classes and I can maybe do the Daubert
3 hearing sort of simultaneously with the bench trial so that
4 we're not wasting additional time, how much time will it
5 take?

6 MR. MONTGOMERY: Yes, I mean, this here is a lot
7 more complicated, your Honor, because if we're not talking
8 any longer as we were a month ago about the TPPs' conduct,
9 that evidence, and we're talking about the individual conduct
10 of each of four companies --

11 THE COURT: Right.

12 MR. MONTGOMERY: -- that we haven't thought about.
13 I think we need to confer. We've got four separate cases.

14 THE COURT: I do, I agree. That's why I'm asking
15 this.

16 MR. MONTGOMERY: And so I think I need to confer
17 and we need to talk about that. We can do that right now,
18 but that's a --

19 THE COURT: So you can prove against four separate
20 defendants in seven days?

21 MR. BERMAN: Yes, your Honor. We planned it out.
22 We've been anticipating this.

23 THE COURT: Okay.

24 MR. MONTGOMERY: May we have a moment?

25 THE COURT: Yes. You know, you don't have to do

1 this on the fly. I mean, it's --

2 MR. MONTGOMERY: We think it's a long time. I
3 mean --

4 THE COURT: Well, I'm not going to probably give
5 you everything you want because in a bench trial, I can play
6 with different ideas, like you can submit the direct by
7 affidavit, and then we can do cross, or you can do the direct
8 by affidavit and then do maybe an hour or two just to sort of
9 bring me along, if you will, to highlight your big points and
10 then have cross. There's so much we can do, and I know this
11 case at this point, so I don't need background on the
12 industry so much. It's always good to refresh my
13 recollection because there's the WACs and the MACs and, you
14 know, all the different acronyms, but basically I have some
15 sense of how it works, so I think it's not going to be so
16 hard. But what date did we have it set for?

17 MR. BERMAN: You just had a month. You didn't give
18 us a date for the November trial.

19 THE CLERK: Yes. It's November 6.

20 MR. EDWARDS: Originally, your Honor, you had
21 November 8 as a potential trial date for BMS when we were
22 doing Class 1 trials first.

23 MR. MONTGOMERY: But in your recent order, you
24 simply said "in November."

25 THE COURT: All right, so fair enough. Okay, so

1 it's November 6? Okay. So I think that's right. As soon as
2 I took Mr. Wise out of the hot seat as the only guy up there,
3 never did I see a happier man as he walked out of the last
4 hearing. Hopefully you're going to have to prove against
5 separate defendants, so it is a bigger case.

6 MR. MONTGOMERY: You know, another issue I just
7 would like to mention, if your Honor is going to do a
8 proceeding that focuses on the defendants' conduct, it is
9 important, I think, you understand that that same evidence is
10 then going to be presented in the individual company cases on
11 Class 1 beginning in March.

12 THE COURT: A lot of it will be.

13 MR. MONTGOMERY: It will be exactly the same
14 evidence, so there is some inefficiency.

15 THE COURT: There's overlap, I understand that, but
16 I just can't wait, and then something else will happen, and
17 then something else will happen. I need some forward
18 momentum on this case. As far as I was concerned, September
19 was where I had blocked off huge amounts of time and staffed
20 up and was ready to go, and then this issue happened with
21 Medicare and with the plaintiffs assuming I'd go
22 publication. That could happen again with another issue.
23 What if the Medicare machines break down or there's another
24 hurricane and then we get bumped again? Things happen that I
25 can't control. But I can control 93A and my schedule, your

1 schedules, short of a national emergency, so I plan on doing
2 this.

3 Now, to the extent I do this, does the United
4 States want to be part of this?

5 MR. GOBENA: Your Honor, we've only intervened,
6 obviously, against Abbott labs and Hospira, so I don't
7 believe they're one of the defendants in that.

8 THE COURT: No, but I sure could use some amicus
9 help on some of these issues.

10 MR. GOBENA: If your Honor would like that, we'd be
11 more than happy to provide amicus briefing on any issues that
12 your Honor would like.

13 THE COURT: So that's a good thought. On
14 individual -- what's coming up obviously, is, will people
15 from the Center for Medicare and Medicaid Services be
16 subpoenaed as part of the trial?

17 MR. EDWARDS: No.

18 MR. BERMAN: Not from us.

19 MR. MONTGOMERY: We don't know.

20 THE COURT: Okay. So one thing, you could work
21 together with them so -- Toohy regulations, is that it? Is
22 that the name of those regulations that you don't get anyone
23 unless you jump through three hurdles --

24 MR. HENDERSON: That's the name of it.

25 THE COURT: -- and do a backward flip, right? You

1 have to decide sooner rather than later if you want a
2 government witness. The issue that might be worthwhile,
3 which I cannot rule on motions for summary judgment till
4 class notice goes out, a problem, at least for -- so, as I
5 understand it, the motions for summary judgment are just
6 sitting there on what AWP means, if you would like to submit
7 an amicus as a statutory matter.

8 MR. GOBENA: You're asking the United States, your
9 Honor?

10 THE COURT: Yes.

11 MR. GOBENA: Yes, I mean, if your Honor would like
12 that, we can do that.

13 THE COURT: Thank you. So do I need my own
14 expert? You all know this case at this point better than I
15 do. Is there anything that's going to be so hard -- the one
16 thing I'm worrying about is not the basic case; I think I can
17 understand it as well as the next person. It's assessing the
18 Daubert challenge. We've let go our independent expert, and
19 the question is, on the expectation theory, which is a novel
20 one, and I understand it's derived from the antitrust area,
21 should I get somebody?

22 MR. MONTGOMERY: Your Honor, if you think it would
23 be helpful, we certainly wouldn't disagree that it may. And
24 while we let Professor Byrne go, I think there's still the
25 reservation that you have to ask him if he's available again.

1 THE COURT: I talked with him, and I'm just trying
2 to remember. I think he had a few offers to do things with
3 the industry, and it was going to conflict him out.

4 MR. CAVANAUGH: Your Honor, we took an informal
5 poll. We don't think any of the companies have retained him
6 at this point.

7 THE COURT: I could give him a call.

8 MR. BERMAN: We were asked, if you recall, to stop
9 retaining him because he wanted to go work for the industry.

10 THE COURT: But maybe he never did, but I think he
11 had an -- I can't remember what it was. I think -- you know,
12 it's funny, you think you remember and you don't -- I think
13 he had an opportunity to go work with somebody in the
14 industry, and he wasn't going to take it if I definitely
15 needed him, and I told him at that stage I wasn't sure.

16 MR. BERMAN: But our concern is that it may not be
17 these four but it may be three others in the AWP case that --

18 THE COURT: Well, I'll ask. I'll ask. And if not,
19 I'll try and find somebody else. Do you have somebody else
20 that you all agreed upon? Was there a runner-up when we put
21 him in the saddle?

22 MR. CAVANAUGH: No.

23 MR. MONTGOMERY: No. They suggested
24 Professor Byrne, and we accepted.

25 MR. SOBOL: Can we have a moment, your Honor?

1 THE COURT: Yes.

2 (Discussion off the record amongst plaintiffs'
3 counsel.)

4 MR. SOBOL: The concern, your Honor, that the
5 plaintiffs would have regarding either Professor Byrne or
6 some other independent expert before you would be a vehicle
7 by which any of the parties could at least question the
8 expert if the expert was going down a trail which they,
9 frankly, thought was incorrect.

10 THE COURT: I think that's actually helpful.

11 MR. SOBOL: And that would be an important
12 procedural safeguard to make sure that --

13 THE COURT: So we're at the trial stage, not the
14 class cert stage.

15 MR. SOBOL: Sure.

16 THE COURT: I think that's totally fair, I agree.
17 Yes, that makes sense because even somebody who's neutral, I
18 mean, it's a difference of expert opinion. It would
19 highlight, at least, the fair areas of disagreement. So if
20 he can't do it, I have actually one other person partly in
21 mind, although I haven't asked him so I'm reluctant to
22 float --

23 MR. CAVANAUGH: Don't tell us.

24 THE COURT: -- that I might call, and if he's
25 available, then float the name, but I'll start with

1 Professor Byrne.

2 Okay, so proposed findings of fact and law, I don't
3 think I need a pretrial memo. I don't have the room for all
4 the memos that I've received in my office, so I think what
5 we're better off doing is a brief set of proposed findings of
6 fact and law just to give me a heads-up about where you're
7 going, and then it can be supplemented afterwards. Does that
8 make some sense to all of you? I'm talking about, you know,
9 20, 25 pages for proposed findings. We could do it the way,
10 actually, you've done it in the past; maybe 25 pages sort of
11 on any common industrywide issues and maybe -- does it make
12 sense to do 15 for each company? I'm going to be getting
13 very company-specific. I mean, at this point, I have to be
14 quite candid, I haven't so much except for maybe a drug here
15 or a drug there, and I'm assuming that it's going to have to
16 be very specific per company.

17 MR. CAVANAUGH: It will be.

18 MR. MONTGOMERY: I think that would be easy for all
19 of us to do, your Honor. I mean, we do have summary judgment
20 papers in front of you. If it's more efficient for you to
21 see this shorter form --

22 THE COURT: Would that be -- I mean, my concern is,
23 as soon as I wait until after the trial to get proposed
24 findings of fact, you will all ask for a month.

25 MR. MONTGOMERY: We're fine --

1 THE COURT: And then you ask for a continuance.

2 MR. MONTGOMERY: We're fine submitting proposed
3 findings beforehand. I'm just reminding your Honor that
4 there are summary judgment papers which --

5 THE COURT: Do you all want to rely on that? That
6 makes sense.

7 MR. BERMAN: No. We would like to submit proposed
8 findings.

9 THE COURT: Well, here's the issue with doing it
10 afterwards: I forget, the problem is. I'm on to seventeen
11 other things. I've got, believe it or not, two other MDLs.
12 I've got a lot of criminal cases. So I'll forget. So when
13 you ask for a month, and then you'll ask for a month
14 continuance, and then you want to reply to one another, and
15 now by the time I get to it, it's four or five months out,
16 and I've forgotten. So I think we're really much better off
17 with things in advance. And if you think the summary
18 judgment motions, I can use that, that would be great.

19 MR. BERMAN: We need to first put in findings that
20 focus more on the 93A issues and all our evidence related to
21 that than we did in the summary judgment.

22 THE COURT: All right, fair enough. Really just so
23 you don't all have to coordinate, do you want to each do a
24 20-page memo, that's it? I'll let you supplement
25 afterwards, 20 pages of proposed findings of fact per

1 defendant, because it's going to be very defendant-specific,
2 and --

3 MR. MONTGOMERY: Do you want common?

4 THE COURT: If you do. Otherwise I could just rely
5 on the summary judgment. The common stuff, I think I know
6 what you're going to say. Whether you prove it up, I don't
7 know, but I think I know the case.

8 MR. MONTGOMERY: When would you like it?

9 THE COURT: I don't know. How about a week
10 beforehand? Does that seem fair enough?

11 MR. CAVANAUGH: That's fine.

12 THE COURT: And you just told me this, but when was
13 the opt-out time for the third-party payors?

14 MR. NOTARGIACOMO: October 1, your Honor.

15 THE COURT: So if I were to rule on the motion for
16 summary judgment, it would probably have to be sometime in
17 October, if I did. I may just move it all into the bench
18 trial, depending on how it goes.

19 Is that all we need to deal with?

20 MR. BERMAN: Could I just ask -- and maybe everyone
21 in Boston knows this, but I don't -- what days of the week
22 you're going to hold court and the what the times will be?

23 THE COURT: In general, we go from 9:00 to 1:00
24 with a half an hour break at 11:00.

25 MR. EDWARDS: Five days?

1 THE COURT: Five days a week.

2 MR. EDWARDS: Your Honor, I assume we're going to
3 have some exchange of witness lists and exhibits?

4 THE COURT: Yes, we'll send out a little pretrial
5 order in general, yes, and premarked exhibits, and I'll want
6 a set of exhibits for me and a set of exhibits for my law
7 clerks. And I will guarantee you that if you start giving me
8 18 boxes a side, I won't look at it. I won't look at
9 anything that's not flagged for me at the trial so I can put
10 a sticky on it and underline it because I'm just not going to
11 sit and read huge boxes of documents. So it would be very
12 useful to have them here, and you'll turn me to such and such
13 a page, and I will underline it, asterisk it and put a flag
14 on it. But I'm not going to just sit and randomly read
15 exhibits. It's not worth it just for an appellate record.

16 So, you know, we can just do it right now. A week
17 beforehand you'll get me -- is that acceptable for a witness
18 list, or do you want to know it further in advance than
19 that? Two weeks in advance?

20 MR. EDWARDS: Yes, I would think further in
21 advance, your Honor, so we can prepare for cross-examination.

22 THE COURT: All right, on both sides. So two weeks
23 in advance, witness lists, premarked exhibits, and share them
24 with one another; any motions in limine, although with a
25 bench trial, I'll tend to just go as we go. And the key

1 unanswerd question, absolutely essential, is: Do you agree
2 that we should do 2 and 3 at the same time?

3 MR. BERMAN: No. We think, given the breadth of
4 the evidence that you're going to hear in 2, we have to prove
5 our case against each person, defendant, we should just get
6 one clean shot done; and that by doing 2, we're going to have
7 laid a foundation for 1 and 3 later on.

8 THE COURT: So what is the increment -- other
9 than -- damages is obviously key, that whole expectation
10 theory, but other than that, what would be different?

11 MR. BERMAN: Testimony about how people were
12 looking at AWP used in the non-Medicare context. There's
13 that whole other umbrella of, you know, they're going to say
14 there were negotiations; we're going to say there were no
15 negotiations. They're going to say physicians had market
16 power to change it; we're going to say that they didn't.
17 None of that is in Class 2 because they had to pay per
18 statute.

19 THE COURT: Well, what if we were to just make it
20 in a Class 2, but I would take everything from Class 2? In
21 other words, I wouldn't start again from scratch.

22 MR. BERMAN: That would be fine with us as well.

23 THE COURT: And we could set something maybe in
24 January -- well, we may all be dead by then, this is such a
25 huge effort. And you'll get me if you think I should do it

1 all at once, and then maybe you'd explain why you think it's
2 appropriate within the next week or two? Does that make
3 sense, a couple of weeks? And you'll tell me why it isn't,
4 and then we'll have plenty of time to resolve it.

5 MR. MONTGOMERY: Thank you.

6 THE COURT: But if we move beyond that, even if I
7 only do 2, I would be planning on doing 3 pretty fast right
8 afterwards. And also, if you could give me some really fair
9 sense of how long you think it would take and the difference
10 between 2 and 3, would it make a difference, that would be
11 really useful.

12 MR. EDWARDS: Your Honor, at the risk of belaboring
13 the issue, would it make sense for plaintiffs to provide
14 witness lists and exhibit lists first so that we're not
15 passing like ships in the night if we do it simultaneously?

16 MR. BERMAN: It should be mutual, your Honor. We
17 have a lot of work to do, and to make us give it to them
18 earlier is a lot.

19 THE COURT: But it does make some sense. So three
20 weeks in advance of the trial you do it. Two weeks in
21 advance of the trial you do it, and then you can supplement,
22 as long as --

23 MR. BERMAN: That's fair.

24 THE COURT: Okay, to meet head on what they're
25 going to do, okay? And then my --

1 MR. SOBOL: Witnesses and exhibits, your Honor?

2 THE COURT: Yes. And my sense is, for people out
3 of town, we're certainly not going to do it the Wednesday
4 before Thanksgiving so you can get out of here by Tuesday,
5 and I'll stop the week before Christmas so people can be home
6 for Christmas parties and the like. So I've got to assume
7 we're going to be done before Christmas. At least I'll be
8 very reluctant to have a trial go beyond that, let's put it
9 that way. So that would leave us what, six weeks? This is
10 probably only going to be a month anyway. I doubt I'm going
11 to let it go a full six weeks. So are we all set?

12 MR. DALY: Your Honor, I wanted to address the
13 amicus point that your Honor raised, speaking for Abbott and
14 Hospira. The federal government, the Department of Justice,
15 CMS, they are now in this case. They are advocates, they are
16 litigants. And Abbott, for one, would object to an amicus
17 brief being filed by an advocate in a matter that's before
18 your Honor. For example, we have a motion to dismiss that's
19 pending that your Honor will be looking at in due course, and
20 we would object to the United States being treated as an
21 amicus on issues that will be litigated in this case with
22 them as a party.

23 THE COURT: I understand, but a lot of the -- and I
24 will take it with that weight that they're now in it. That
25 having been said, it's a statutory issue and they're the

1 agency. I'm assuming they're going to represent CMS in this,
2 right?

3 MR. GOBENA: They're our client, your Honor.

4 THE COURT: They're your client? So I would like
5 to know what CMS's position is.

6 MR. GOBENA: Your Honor, a procedural matter
7 related to that. When would you like any briefing on this
8 issue? I mean, I understand you have a trial coming up.

9 THE COURT: I'm not here to destroy your family
10 vacation. When could you do it?

11 MR. GOBENA: You know, I think I'd probably need a
12 few weeks.

13 THE COURT: You're getting a whisper from over
14 here.

15 MR. GOBENA: Your Honor, if we could have it by
16 September 15, the second week in September, if everything's
17 provided, that would be helpful for us.

18 THE COURT: September 15.

19 MR. GOBENA: Is that too late for your Honor?

20 THE COURT: Okay. But it can't be an extension
21 because the truth is, if I'm going to rule on it, the motion
22 for summary judgment, I can't rule on it until after the
23 opt-out period, which is only two weeks later. However, the
24 trial is looming. I'm not sure I can get out a decision -- I
25 may merge it all into the bench trial, but it can't be any

1 later than that. So I know you have a thousand hoops to jump
2 through down there, but I'll need it.

3 And let me ask you this: If they need some witness
4 from the Center for Medi -- either side decides to call
5 someone, are you the person they should get in touch with to
6 sort of jump any of those hurdles?

7 MR. GOBENA: Either contact myself or
8 AUSA Henderson.

9 MR. DeMARCO: Your Honor, on behalf of the
10 Track 2s --

11 THE COURT: Yes, I saw you sitting back there
12 silently.

13 MR. DeMARCO: Thank you. Good afternoon, your
14 Honor.

15 THE COURT: Good afternoon. Welcome back.

16 MR. DeMARCO: If the Track 1s are finished, we just
17 wanted to have a few minutes to address a couple of lingering
18 Track 2 issues, in light of the upcoming class cert hearing
19 next month.

20 THE COURT: Okay. I haven't read it yet.

21 MR. DeMARCO: That's fine. We don't want to cut
22 into their time.

23 THE COURT: No, they're done.

24 MR. DeMARCO: They're done. Okay, well, my
25 colleague Scott Stempel would like to raise a couple of

1 issues with respect to the class cert hearing and a couple of
2 other housekeeping matters as well.

3 MR. STEMPELL: Your Honor, just one issue with
4 respect to the class cert hearing that occurs. As you were
5 discussing the possibility of bringing in an independent
6 expert, we thought it was a terrific area when you did it to
7 consider class certification for Track 1. We've got the
8 hearing coming up. Professor Byrne specifically identified
9 some areas that were in need of further development of the
10 record, which is exactly where we focused in discovery when
11 you sent us off to do discovery; specifically, the treatment
12 of multisource drugs and private payor physician-administered
13 drugs. And we think it would be helpful to have an
14 independent expert, Professor Byrne if he's available,
15 consider the record that we've developed to shed some light
16 on any lingering questions.

17 THE COURT: On class cert?

18 MR. STEMPELL: On class cert, in continuation of
19 the role he has played, and in fact --

20 THE COURT: I'll see. I released him, so I just
21 would have to find out.

22 MR. STEMPELL: There's one housekeeping issue that
23 Abbott and Dey have asked me to raise, and that is an open
24 issue on an objection from a ruling from Magistrate Bowler.
25 It's Docket 2140. It was fully briefed back in March, and it

1 had to do with a --

2 THE COURT: The objections were briefed?

3 MR. STEMPELL: Yes, the objections were briefed.

4 Judge Bowler issued an order quashing some third-party
5 subpoenas and --

6 THE COURT: I'm sorry, I missed that, so I'm glad
7 you brought that up, so we'll get those.

8 MR. STEMPELL: And just to alert you, we believe we
9 have reached an agreement, and we'll be submitting a joint
10 scheduling order relating to Mr. Bean, who is the belatedly
11 added class rep.

12 THE COURT: Okay, thank you. And have we
13 subpoenaed CMS yet for the lists with respect to Track 2 so
14 I'm not back where I started?

15 MR. BERMAN: We're right on the verge.

16 MR. MONTGOMERY: Your Honor, with respect to the
17 amicus brief, we would like leave to respond, if there's
18 anything we need to respond to it.

19 THE COURT: Of course.

20 MR. MONTGOMERY: And in particular, we'd like to
21 address the question, at least these three gentlemen would,
22 whether it's appropriate for your Honor to rule on the
23 statutory issue in light of the pendency of the notice
24 process with respect to Class 1. I think there's a potential
25 complication there as a Rule 23 matter.

1 THE COURT: Well, I can do it with respect to TPPs,
2 and then I'm going to have to do it again with respect to
3 Class 1. And that's a legal issue, in any event. What I'm
4 trying to say is, the odds of my issuing an opinion before
5 the -- what it might mean I have to do is wait until the
6 opt-out period for Class 1.

7 MR. MONTGOMERY: And that's all I was suggesting.

8 THE COURT: But it doesn't mean I have to stop
9 doing the trial.

10 MR. MONTGOMERY: I wasn't suggesting that, your
11 Honor. It was just a matter of when you issue a ruling.

12 THE COURT: It's a good question because
13 essentially, while not technically binding on the class, as a
14 matter of law of the case -- I wouldn't be violating anything
15 by doing that, but the question is whether it's wise. Do you
16 follow me, Mr. Sobol and Mr. Berman?

17 MR. BERMAN: Yes, your Honor. And our position is
18 that since you're not ruling on a claim but you're only
19 ruling on the legal meaning of the term, that you can do that
20 before the Class 2 trial, and that it's really not --

21 THE COURT: It may be. I just haven't thought of
22 it, and it's a great point. I'll think of it. If worse
23 comes to worse -- I mean, I'm not going to spit this thing
24 out like a, my expression, an ATM ruling where you stick in
25 the card and out comes the opinion. The odds of my even

1 finishing it before the opt-out period for the Class 1s is
2 pretty low, I think, so -- okay, great, have a nice summer,
3 because I don't see you again, do I?

4 MR. BERMAN: No, your Honor.

5 THE CLERK: Court is in recess.

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court
Reporter, do hereby certify that the foregoing transcript,
Pages 1 through 35 inclusive, was recorded by me
stenographically at the time and place aforesaid in Civil
Action No. 01-12257-PBS, MDL No. 1456, In re: Pharmaceutical
Industry Average Wholesale Price Litigation, and thereafter
by me reduced to typewriting and is a true and accurate
record of the proceedings.

In witness whereof I have hereunto set my hand this
8th day of August, 2006.

LEE A. MARZILLI, CRR
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